IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 129

GEORGE W. DOUD, DONALD Q. McDONALD, AND J. WESLEY CARLSON, DOING BUSINESS AS BONDIFIED SYSTEMS, AND EUGENE DERRICK,

Plaintiffs,

vs.

ORVILLE HODGE, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND JOHN GUTKNECHT, STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS,

Defendants.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO AFFIRM.

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the decree of dismissal of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ship do business as one entity—same Chicago office, same books; same employees.

The money orders sold by appellants misrepresent on their face that they are "licensed" and "bonded". The evidence is that they are not licensed by the state, and they are not bonded for the benefit of the public. The obvious purpose of such a fraud is to make the public believe that they are licensed and bonded under the Currency Exchange Statute.

The evidence showed that the American Express Company is an unincorporated association organized under the laws of New York in 1868 with a consolidated worth then of $18,000,000. Its consolidated assets as of 1953 totalled $564,225,148; and its surplus and reserves amounted to $17,563,840. It has over $2,000,000 on deposit in 14 Illinois banks, and maintains 3 offices in Chicago.

It has thousands of offices and sub-agencies all over the world; it was the depositary of the United States Treasury Department; it is subject to federal surveillance, and its wholly owned subsidiary, American Express Company, Inc., is licensed and examined by the Banking Department of New York.

Its financial responsibility has stood the test of time. It has outlived many depressions. It is a worldwide institution of vast ramifications and proportions, and there is no other like it.

The evidence showed also that for the year ended September 30, 1952, the 667 licensed community currency exchanges in Illinois issued $445,812,899 in money orders; that their assets totalled $15,780,631; that in excess of 80% of said sum constituted cash and liquid funds; that they filed with the Auditor of Public Accounts surety performance bonds in accordance with Sec. 5 of the Statute aggregating $7,781,000, and covering 91.7% of their average money order liability.

No application for a temporary injunction was ever made by appellants in the District Court. It was not alleged, and it does not appear, that any proceeding was instituted in the State courts to restrain appellants, or to subject them to the criminal penalties provided by the Statute. There was no showing of irreparable injury, clear, great, and immanent.

The District Court dismissed the amended complaint for want of jurisdiction because of appellants' failure to exhaust their remedy in the State courts and secure a decision from the Supreme Court of Illinois on the constitutionality of the Statute *as applied to them.*

ARGUMENT

It is not true, as is recited on p. 8 of the jurisdictional statement, that "every material allegation of the amended complaint was either admitted or found as a fact by the court."

The facts set forth above, which were not alluded to by appellants, or the District Court, are deserving of consideration in determining whether that Court abused its judgment in refusing to extend to appellants the assistance of the federal equity jurisdiction. It is needless to suggest that the existence of a question as to the constitutionality of a state law is not itself ground for relief in the Federal courts. Other conditions must be met before the Federal courts will take jurisdiction; and they have certainly not been met in the case at bar.

1. Where the plaintiffs have a clear and adequate remedy in the State courts, as they do here, the Federal courts will not entertain equity jurisdiction to pass upon the constitutionality of State legislation. (*Burford* v. *Sun Oil Co.*, 319 U. S. 315, 332, 333, footnote 28; *Alabama Com.* v. *Southern Ry. Co.*, 341 U. S. 341, 349, 350.)

2. Before the Federal courts will entertain such jurisdiction, it must appear that "the danger of irreparable loss is both great and imminent." No such showing has been made here; and no reason appears why appellants, if civil or criminal proceedings were brought against them in the State courts, could not set up the alleged unconstitutionality in such proceedings. (*Douglas* v. *Jeannette*, 319 U. S. 157, 162-164; *Watson* v. *Buck*, 313 U. S. 387, 400, 401.)

3. Where the threatened prosecution is by state of-

ficers for alleged violations of a State law, the State courts are the final arbiters of its meaning and *application*, subject only to review by the United States Supreme Court on federal grounds appropriately asserted. (*Douglas v. Jeannette*, 319 U. S. 157, 163.) Only the State Supreme Court can give the authoritative answer; and this Court has "insisted that Federal Courts do not decide question of constitutionality on the basis of preliminary guesses regarding local law", and that any speculative construction of how the State Supreme Court would view the law, was at best "a forecast rather than a determination." (*Spector Motor Co. v. McLaughlin*, 323 U. S. 101, 104, 105.) This Court has also said that it would be an abuse of discretion on its part to make a pronouncement on the constitutionality of a State Statute, *which the State Courts would not be bound to follow*, "when the court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the Statute *when applied to any particular state of facts*." (Italics ours.) (*Federation of Labor v. McAdory*, 325 U. S. 450, 474.) And in *C. I. O. v. McAdory*, 325 U. S. 472, 477, this Court again said:

> "Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are *without jurisdiction* to consider it in the first instance here." (Italics ours.)

4. Federal courts will not seize litigations from State courts because one, normally a defendant, goes to the Federal court to begin his federal law defense before the State court begins the case under State law. Anticipatory judgment by a Federal court to frustrate action by state officials is intolerable to our federalism. (*Public Service Com. v. Wycoff Co.*, 344 U. S. 237.) Where equitable interference with State statutes is sought in the Federal courts, judicial consideration of acts of importance primarily to

the people of the State should be left by the Federal Courts to the State courts unless *exceptional* circumstances command a different course. (*Stainback* v. *Mottock*, 336 U. S. 368, 383.)

5. The question whether the severability clause contained in Sec. 30 (par. 56.3) of the Statute in question would be so applied as to remove the alleged objection is a question which may be more appropriately left for adjudication to the Illinois Supreme Court. (*Leavitt* v. *Lee*, 288 U. S. 517, 541; *Dorchy* v. *Kansas*, 264 U. S. 286, 290, 291.)

6. The question whether appellants have come into equity with unclean hands, which the appellees interposed as a defense in their answer to the amended complaint, is likewise a matter of local law. (*Ford* v. *Caspers*, 128 F. (2) 884, 885, C. A. 7.)

7. Appellants' assertion that the Statute is clear, and that *McDougall* v. *Lauder*, 389 Ill. 141 is a clear decision of the State Supreme Court that the exemption of American Express Company is valid, so that there was no need for further recourse to that Court, is emphatically contradicted by *Currency Services, Inc.* v. *Matthew*, 90 F. Supp. 40, which appellants also insist controls the case at bar.

In the latter decision, Circuit Judge Lindley said that inasmuch as the plaintiffs there were engaged solely in the business of selling money orders, they were in a position to attack the alleged discrimination in the Wisconsin Statute, and that *Wedeseweiler* v. *Brandaio*, 297 Ill. 228, rather than the *McDougall* case applied; that if the plaintiffs there had been engaged in the "usual" currency exchange business, then the result would be different, and the *McDougall* case would control; and ordered the issuance of a permanent injunction until such time as the plaintiffs went into the "usual" community currency exchange business.

If, therefore, appellants here rely entirely upon Judge Lindley's decision, as they stated upon the trial, and repeat in their jurisdictional statement, then it is certainly a matter for the Illinois Supreme Court to decide whether *as applied to them*, the *Wedeking* case or the *McDougall* case should control.

If, on the other hand, appellants would disagree with Judge Lindley and say that the *McDougall* case does settle the matter for Illinois *as applied to them*, it still would not justify the exercise of Federal equity jurisdiction, because the objection of lack of irreparable loss, both great and imminent, has not been removed, and also because the assertion that the State Supreme Court has already passed upon the question does not mean that the question should not be presented to it again. It does not necessarily follow that if the matter were presented by appellants to that Court again, especially in the light of Judge Lindley's opinion, it might not change its holding.

That very position was taken by the 7th Circuit Court of Appeals in an analogous situation, *Achtien v. Dowd*, 117 F. (2) 989, at 995, concurred in by Judge Lindley.

That Judge Lindley was not in disagreement with the views contended for by appellees in this motion appears also from the *per curiam* opinion in *Bevins v. Prindable*, 39 F. Supp. 708 (aff'd. 314 U. S. 573), in which Judge Lindley likewise participated.

In the light of such decisions, it is not likely that Judge Lindley would have decided *Currency Services, Inc. v. Matthew*, 90 F. Supp. 40, as he did, had the federal court's jurisdiction been questioned there.

Conclusion

In *Railroad Com. v. Eastman Co.*, 312 U. S. 496, 499, 500, this Court aptly said:

> "The last word on the meaning of * * * the Texas Civil Statutes * * * belongs neither to us nor the district court but to the Supreme Court of Texas. * * *
>
> "The history of equity jurisdiction is the history *of regard for public consequences* in employing the extraordinary remedy of the injunction. * * *. *For public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with State policies.*" (Italics ours.)

At least as forcible in its impact upon the present case is *Chicago v. Fieldcrest Dairies*, 316 U. S. 168. In that case, respondent assailed an ordinance the intent of which was to interdict the retail sale of milk in waxed paper containers instead of glass bottles. The ordinance was attacked on the ground that (1) it was insubordinate to State legislation, which, it was claimed, had stripped cities of the power to regulate the type of containers in which milk could be sold to consumers, (2) it was insubordinate in various respects to the Constitution of Illinois, (3) it denied Fourteenth Amendment due process and (4) unreasonably burdened interstate commerce. This Court held that the presence of substantial questions of State constitutional and statutory law should have remitted the parties to the State tribunals for resolution of those questions.

A "state-wide doom by a federal court of a state's legislative policy," without first permitting the State Supreme Court to pass upon it, would hardly comport with that restraint which this Court has frequently exhorted the lower Federal courts to exercise in cases of this kind. (*Alabama Com. v. Southern Ry. Co.*, 341 U. S. 341, 349; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 297-298; *Toucey v. N. Y. Life Ins. Co.*, 314 U. S. 118,

129, 141; *Phillips v. U. S.*, 312 U. S. 246, 250, 251; *Rayford v. Sun Oil Co.*, 319 U. S. 315, 332.)

The motion to affirm should be granted.

Respectfully submitted,

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